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LAW, EMOTION, AND TERRA NOVA: NEAL FEIGENSON AS BOTH RADICAL AND REFORMER

*Terry Maroney**

I am honored to have been asked to come here on this occasion to celebrate the accomplishments of Neal Feigenson and Linda Meyer. I cannot imagine a better way to celebrate the two of you than to engage deeply with your work. Thank you very much for having me as part of this conversation.

I have three goals this morning. First, I want to situate Neal's work within the larger universe of law and emotions scholarship. Second, I am going to distill what I see as Neal's greatest contribution to the field. Third, I want to push at the edges of his work, pointing to some questions it leaves unanswered but perhaps can help us answer.

To start out, what is this thing that I call "law and emotion scholarship"? When people ask what I do, I say: "I research the role of emotion in law." Then they usually ask me to repeat that. And when they are sure that they have heard me correctly, they usually give a response along the lines of: "Wow! Well, that sounds . . . interesting. Um, what are you talking about exactly? Like crimes of passion? That kind of thing?" To which I say: "Yes, absolutely. But also so much more than that."

Law and emotion scholarship can engage with law on its own terms. It can seek to expose moments where the law already incorporates some kind of emotional component, and it can show how a richer understanding of emotion could inform or refine how the law treats that component. With crimes of passion, for example, we might ask people to notice how that aspect of criminal law doctrine privileges some emotions over others. For example, anger is more valued than contempt. We might also ask them to notice how the law reflects lay theories of how those emotions operate. For example, what makes people angry? How does anger make a person act? How long do those

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effects persist? Scholars studying law and emotion might then bring in insights from other disciplines—often psychology, sometimes anthropology or philosophy. (We are an eclectic, catholic bunch; if it helps us figure out a question about emotion, we bring it in.) We will bring in those disciplines to help us evaluate if those lay theories are accurate. Do they ignore factors of which the law might want to take notice—for example, individual variation?

This first level of law and emotion scholarship has located many targets in law just waiting to be explored. Think about emotional distress damages, or the excited utterance exception to the hearsay rule. These are moments in which the law incorporates an emotional component, and we can help the law think about that component in a more intelligent way.

But the law and emotion project can operate on a second, and deeper, level as well. Law and emotion scholarship questions a core assumption on which so much of Western jurisprudence depends. It questions the idea that there are two things, called reason and emotion, and that they are different; that law is supposed to be about reason, not emotion; and, therefore, that these scattered emotional outposts in law, such as the ones that I just nodded to, should be treated just like that—as outposts, necessary concessions to human frailty. In this view, we have to police the borders of these outposts so that emotion does not somehow creep out and start infecting the territory of legal reason.

Now we¹ ask: “Where did that idea come from? Why are we so wedded to it? Haven’t we just accepted this commonsense, received wisdom, rooted in the European enlightenment intellectual tradition, about the irrationality of emotion?” We have drunk the Kool-Aid of the idea that emotion is by its nature primitive and irrational, that it is a disruptive force meant to be contained, and that one of the functions of law is to build structures that will contain it. So, we ask: “Why would evolution have endowed us with this extraordinary capacity for human emotion, and why would it be so important to virtually every aspect of human survival and flourishing, if it were not good in some way? And, if that is so, how could that value not extend to law, at least in some way?”

If the first iteration of law and emotion scholarship is reformist, the second iteration is radical. It asserts that emotion is not necessarily antithetical to legal reason. If we truly understood that, we insist, we

1. “We” being this odd tribe of law and emotion scholars.

might go about law in a profoundly different way.

This brings me now to Neal Feigenson's work. Neal's work operates on both levels: he is primarily a reformer, but he has radical aspirations as well. I think he sometimes asserts these aspirations after he has softened us up by convincing us of the value of the reformist project. Let me tell you what I mean by this.

One facet of Neal's very impressive body of work focuses on the role of emotion in juror decision making. In an influential series of articles, studies, books, and book chapters, now spanning several decades, Neal tries to move us beyond lay theory and common platitudes about juror emotion.² He instead has tried to both generate and use—to pick up the dolphin theme³—the very best empirical and psychological research to theorize how those emotions might actually operate. This alone is a vital contribution to the literature. Neal's command of the psychology is unimpeachable. His ability to explain it clearly to a legal audience is unmatched. He forces a sharpness on a traditionally very muddy inquiry, asking questions like the following: "Which emotions, elicited by which sources, under what conditions, affect what kinds of decisions, to what extent, mediated by what other kinds of thoughts or feelings?"⁴ Even more remarkably, he tries to answer that question.

I would summarize Neal's major conclusions as follows, recognizing that I am doing a disservice to a very complex set of ideas.

First, emotions effect informational processing. For example, as he points out, sadness tends to lead to more careful or systematic information processing.⁵ Anger, in contrast, tends to lead to greater reliance on heuristics.⁶

Second, emotions effect attributions of blame. He discussed this just this morning.⁷ For example, both sympathy for victims of wrongdoing and anger at perceived wrongdoers can increase judgments of responsibility and blame, and can mediate legal determinations as to the relative share of fault in comparative negligence cases.⁸

2. See, e.g., Neal Feigenson, *Emotional Influences on Judgments of Legal Blame: How They Happen, Whether They Should, and What to Do About It*, in *EMOTION AND THE LAW: PSYCHOLOGICAL PERSPECTIVES* (Brian H. Bornstein & Richard L. Wiener eds., 2010).

3. Shari Seidman Diamond, *Thoughts on Total Justice*, 30 QUINNIPIAC L. REV. 467, 471 (2012).

4. Feigenson, *supra* note 2, at 45.

5. See *id.* at 47.

6. *Id.* at 48.

7. See generally Neal Feigenson, *Law's Common Senses*, 30 QUINNIPIAC L. REV. 459 (2012).

8. Feigenson, *supra* note 2, at 50.

Third, emotion's effects are very complex. As Neal points out, this is not something where you can draw nice, clean, linear models, as emotions and moods prompted by completely irrelevant factors can persist and affect legal decision making.⁹ We—or jurors—can misattribute those feelings to legally relevant stimuli. Additionally, emotions and judgments can reinforce one another through a recursive feedback loop.¹⁰ Neal is trying to match the complexity of the question with an appropriately complex set of answers.

Now this, I believe, is the reformist aspect of Neal's agenda. He is seeking to explain jury emotion *as it is*, so that we can evaluate whether law's efforts to channel and contain that emotion are likely to be adequate and effective. He often will clarify in his work that he is setting aside the question of whether juror emotion might sometimes be valuable, something we want to cultivate or encourage.¹¹ Instead, he works within law's assumption that that is not the case. Thus, he can evaluate whether anti-sympathy instructions, for example, are likely to work, whether lawyer argumentation ought to be more vigilantly policed, and how judges ought to exercise their authority to shield jurors from emotionally salient, vivid demonstrative evidence, such as gory photos.¹²

But lately Neal has also begun to show us his radical side. For example, in an article from a 2010 Nebraska symposium on law and emotion, he makes a critical move (in his words) from the "descriptive to the normative," and ventures some thoughts about "when, if ever, it is a good thing for legal decision makers' emotions to influence their judgments."¹³ (See how he butters us up and then just sneaks that right in there?)

As Neal correctly points out, to answer that question one has to stake out a position on what makes a legal determination good. What makes the process by which a legal determination is reached "good"? What makes that determination, or the process, "legitimate"? And, much to his credit, "Comrade" Feigenson articulates the many criteria that one could use to make that judgment, and then maps what he has told us about emotion onto each one of those criteria.¹⁴

For example, he suggests that jury emotion may serve as an

9. *See id.* at 52.

10. *Id.* at 52.

11. *See, e.g., id.* at 46, 62–63.

12. Feigenson, *supra* note 2, at 83–89.

13. *Id.* at 46, 63.

14. *See generally id.* at 64–63.

important, non-replicable signal of a wrong in need of being righted.¹⁵ Some emotions, he also suggests, might encourage helpful perspective-taking, such as sympathy.¹⁶ More negatively, when compared to colder cognitions—again assuming the ability to make such a clean split—a jury’s emotions might be less amenable to critical scrutiny and correction. They can lead to distorting congruency biases.¹⁷ Neal stops short of true revolution and instead tosses these ultimate normative questions back into our collective laps. Indeed, he describes his own normative account as deliberately “thin.”¹⁸ But there is no question that it is a lot thicker than before he got his mitts on it.

Neal’s work on jury emotion thus embodies the best of what law and emotion scholarship can be, on two levels. He leverages insights from psychology to help the law do better what it purports to be doing already. And then he very gently asks us to consider whether we might not want to do something completely different altogether.

This brings me to the final portion of my remarks, which is: “What territory does Neal’s work leave untouched?” I suggest that the true *terra nova* is populated by the legal actors whose emotions Neal’s work does not examine—to wit, everyone except jurors. This matters a lot, because I think that jurors do not matter.

Okay, this is where I am waiting for somebody to throw the fruit plate at me. Just so I do not get thrown out of this function, I will back off that statement. Jurors matter, they absolutely matter. But they often do not matter much, and they often do not matter nearly as much as perhaps they used to, or as much as we think they do. It is sort of like saying that the death penalty does not matter because there are so many criminal cases and so few get the death penalty. Well, it kind of matters to you if you are the one getting the death penalty. So jurors clearly matter; but other things matter more in the routine course of business of what we are doing in law.

We all know the statistics. About ninety-eight percent of civil cases and ninety-five percent of criminal cases are disposed of without trial, let alone a jury trial. Even looking at the cases on which Neal focuses in his work drives this point home. There are two groups of post-September 11th cases which Neal has written about:¹⁹ one is still tied up in the

15. *Id.* at 67.

16. Feigenson, *supra* note 2, at 67.

17. *Id.* at 68.

18. *Id.* at 65 n.11.

19. Neal R. Feigenson, *Emotions, Risk Perceptions and Blaming in 9/11 Cases*, 68 BROOK. L. REV. 959 (2003).

appellate courts over the reach of the Foreign Sovereign Immunities Act,²⁰ and the other is staggering along in the procedural behemoth known as the *In re World Trade Center Disaster Site Litigation*.²¹ I do not know if any of the cases in either of those two categories is ever likely to see a juror at all, let alone an emotional juror. In another case Neal writes about,²² the defendant saw his jury verdict overturned because he should have been tried in juvenile court.²³ When the defendant returned to juvenile court—where generally there are no juries—he pleaded guilty.²⁴ Of the four cases on which Neal focuses with the greatest specificity, in only one case, *SEC v. Koenig*, did a jury and its emotions actually matter.²⁵

Nor do jurors matter as much as the law and psychology literature would suggest. We love to talk about jurors in large part because their decision-making is the easiest to model experimentally. It is relatively easy to make experimental subjects into mock jurors because they are, after all, laypersons, and that is what jurors are. We can give common people, even undergraduate students, tasks that track pretty closely what jurors are allowed to do. We can also draw on experiments with no obvious legal framework whatsoever, so long as they have to do with ordinary decision-making by ordinary people and might reflect something that jurors think, feel, or do. But, I would venture, these are reasons that reflect the needs of the research community, not necessarily the reality of the legal community.

If we were to look at the legal decision-makers whose emotions really matter most, and most frequently, I think we would be looking at judges, clerks, prosecutors, defense attorneys, civil litigators, mediators, police officers, probation officers, court room deputies, expert witnesses, legislators, and so on.²⁶ I think we could take Neal's careful

20. *In re Terrorist Attacks on September 11, 2001*, No. 03 MDL 1570 (GBD)(FM), 2012 WL 135695 (S.D. N.Y. Jan. 17, 2012).

21. *In re World Trade Center Disaster Site Litigation*, Nos. 21 MC 100(AKH), 21 MC 102, 21 MC 103, 2011 WL 6425111 (S.D.N.Y. Dec. 20, 2011).

22. Feigenson, *supra* note 2, at 69. The defendant, Mychal Bell, is one of the Jena Six, whose Louisiana jury trial Neal describes.

23. Richard G. Jones, *Conviction in Racially Tinged Louisiana Case is Overturned*, N.Y. TIMES, Sept. 15, 2007, <http://www.nytimes.com/2007/09/15/us/15jena2.html>.

24. Associated Press, *Pleas End Jena Six Case*, N.Y. TIMES, June 27, 2009, <http://query.nytimes.com/gst/fullpage.html?res=9C05EEDC1638F934A15755C0A96F9C8B63>.

25. Feigenson, *supra* note 2, at 73; *Securities and Exchange Commission v. Koenig*, 532 F.Supp.2d 987 (N.D. Ill. 2007), *aff'd in part*, 557 F.3d 736 (7th Cir. 2009) (affirming jury verdict).

26. It is a long list, and law professors are probably somewhere at the tail end of that

methodology and apply it to these people, instead of jurors, and perhaps generate hypotheses and conclusions that could have even greater reach and relevance.

There are, however, problems with this approach. The first problem is that the translation from the laboratory to the courtroom, police station, law firm, or legislative committee—pick your target—is not necessarily going to be so neat or clean. These are not laypersons performing a lay function; nor are the parameters of their decision-making settings nearly so neatly defined. So, we might ask: “Can laypersons be adequately micro-trained, in the context of an experiment, to perform something approximating the relevant professional function? Can we construct experimental confines that somehow mimic the decision-making settings in which these people are put, such that performance of the function within that constructed setting by experimental subjects might potentially tell us something?” Or, we might also ask: “Can we just study those people directly? Can we do what Shari Diamond has done with jurors?²⁷ Can we do it with judges, courtroom deputies, police officers, law firm partners, and all the other relevant people?”

In my own work, looking at the influence of emotion on judges, I ask myself precisely that last question. It is actually a very hard question. For example, if I ask judges about their emotions, will they answer me? Will they answer me truthfully? How can I ask them questions that are reasonably calculated to get at something real about judges’ emotions, as opposed to what they might want to believe, or what they might want to project? These are very, very, thorny methodological difficulties.

There is a second difficulty too. One of Neal’s major conclusions about juror emotion is that the most effective containment device is exposure control. If we are concerned about a particular juror emotion having a deleterious effect in any given instance, we can refine and rely on the mechanisms that shield jurors from exposure to the stimulus that would prompt the emotion about whose effects we are concerned. You cut it off before the emotion arises by not having the stimulus present.

That makes a lot of sense for jurors, but it does not make much sense for anybody else. The judge, for example, can decide to bar

distribution.

27. See e.g., Shari Seidman Diamond et al., *Jury Discussions During Civil Trials: Studying an Arizona Innovation*, 45 ARIZ. L. REV. 1, 16–23 (2003) (describing methodology used to study jury discussions).

admission of that gory autopsy photo, but she has to look at it first. So do the police, the experts, the lawyers, and probably the courtroom deputy. I once had a case involving gory autopsy photos; the guys in the copy room of my law firm had to see the photos and process their feelings about the photos. Exposure control works for almost no one but jurors, because jurors are the only ones in a constructed environment.

Because non-juror legal actors cannot be cordoned off from stimuli to the same degree, and potentially to no degree at all, containment cannot be our go-to solution. We need to come up with a different sort of go-to, and I am not sure what that is. I think it involves the skill of emotion regulation. With everyone except jurors, we have to look at what mechanisms we can invent, borrow, leverage, or use (in a “dolphin” kind of way) to help these actors cope reasonably with stimuli that they cannot help but encounter, and to help them cope reasonably with the emotions that they cannot help but feel in response. I think that is the real *terra nova*.

As we stare across this border towards this daunting new territory, Neal’s work says to us, and it certainly says to me: “Don’t panic. There was a time when juror emotion felt just as new and every bit as unknowable. Here is how I made a road through that territory. I showed you some ways in which existing roads can be repaved. I pointed to some places where we could lay down entirely new roads. We will make our way through this new land as well.”

So thank you, Neal, for your work. I am, this morning, constructing a new picture in my mind of you as a “radical Renaissance dolphin.” I think that instead of the traditional chair or crystal knick-knack that you might get to reflect this honor, we might need to commission a stuffed animal. I am thinking of a dolphin with a little Che beret—and a lute, perhaps. For your work as a reformer, a sometimes radical, and apparently a dolphin, thank you for showing me the way, as I stare at this *terra nova*, to try to be as good as you are. Many congratulations on this wonderful achievement.